cial effect on U.S consumers and the broad U.S. public interest.

Many parties propose modifications of the EMA test to minimize the impact that it might have on their own particular operations.[30] Some smaller carriers propose an exemption from the policy for carriers whose revenues are below a certain threshold.[31] Cable and Wireless, undoubtedly concerned about its monopoly position in many countries throughout the world, asks the Commission to focus only on a foreign carrier's "home" market (where C&W just happens to be non-dominant) and ignore other "primary" markets as defined in the NPRM. Resellers seek exclusion of resale carriers from the EMA test.

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[30] On the other hand, in a transparent effort to insulate themselves from further significant competition, AT&T and MCI argue for stringent application of the EMA test, applying it (in MCI's case) to entities with as little as a five percent interest in a U.S. carrier, and to further tighten the noose around potential competitors, they would aggregate the interests of individual foreign carrier investors in applying the test. See, MCI at 10-12 and AT&T at 25-27. The justification they give for aggregation of interests is not to increase the Commission's "leverage" to open a foreign market (it is difficult to see how aggregation could have any such effect) but instead to guard against anticompetitive discriminatory actions favoring the U.S. affiliate. However, in addition to questionable legality of applying an EMA test in the absence of a transfer of control, there is no need to aggregate the interests of multiple foreign investors in order to protect against discrimination. Instead, as discussed above, concerns about discriminatory actions should be addressed through industry-wide rules that apply even when there is no foreign ownership interest.

[31] See, e.g., Communications Telesystems International at 3-6, and Transworld Communications at 3.

Other carriers whose transactions have been reviewed under the Commission's previous policies seek exemption from reexamination under the proposed changes in policy.[32]

Rather than attempt to ameliorate the concerns of particular carriers by carving out special exemptions, Sprint believes that the challenges to the EMA test are so fundamental that the Commission should reexamine whether its proposed EMA test has any validity to begin with. Clearly, its application to non-controlling equity investments by foreign carriers in U.S. carriers is open to significant legal challenge, since Section 214 -- the section of the Act the Commission proposes to rely on for this purpose -- simply has no relevance to regulation of non-controlling investments, whether by foreign carriers or anyone else. Where radio licenses are involved, the statute gives the Commission no authority to consider taking action if the level of foreign investment falls below 25%, and as many of the comments have pointed out, Congress contemplated that the Commission would bear the burden of showing that investment greater than 25% should not be permitted, rather than putting the burden on the parties to such a transaction. And given the serious issues raised about the effectiveness of the EMA test in successfully opening up foreign markets, and its possible harmful effects on the U.S.

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[32] See, e.g., AmericaTel at 3-5, IDB Mobile at 9-10, TLD at 60-62, and MCI at 27 (n.20).

market, it is highly doubtful that the Commission could satisfy this burden.

Furthermore, cases not involving entry or control are poor candidates for application of a "trade" policy in any case. Non-controlling foreign investment has traditionally been regarded as in the U.S. public interest,[33] and it is illogical to attempt to equate such investments with actual entry of U.S. carriers in foreign markets. The only possible danger that non-controlling foreign investments might present is an incentive to engage in discriminatory conduct among U.S. carriers, and that danger is better solved through promulgation of industry-wide rules, patterned on the conditions imposed in BT/MCI, than through use of an EMA test.

With respect to transfers of control or direct entry by foreign carriers into the U.S market, the Commission can and should use a case-by-case approach in determining whether such foreign entry is in the public interest, and consider the views of the Executive Branch in determining where the public interest lies. However, it is not at all clear that the Commission can refuse to permit entry or a change in control, otherwise in the public interest, merely as a device to obtain leverage over a foreign government, as the EMA test contemplates. This is particularly true where leverage would be applied in support of an objective as broad as foreign trade,

[33] See, e.g., BT/MCI, 9 FCC Rcd at 3964 (¶23).

whose nexus to the Commission's jurisdiction is at best tertiary and whose implementation has been assigned to other parts of our government.

VI. OTHER ISSUES

In its initial comments, Sprint did not object to the Commission's proposal, in ¶79, to codify its existing policies regarding interconnection of private lines to the public switched network. As a general matter, Sprint favors promulgation of Commission policies in the form of explicit rules that appear in the Code of Federal Regulations, rather than reliance on sometimes vague or ambiguous formulations of the policy in the text of a lengthy decision. Reducing such a policy to a concrete rule is both a useful discipline that allows the Commission to make sure that the policy says exactly what the Commission intends it to mean -- nothing more and nothing less -- and also a convenience for those who practice before, or are regulated by, the Commission.

However, IDB Communications makes an extensive argument that the Commission's present description of its policies, in conjunction with its proposed definition of a facilities-based carrier, represents a departure from its past private line interconnection policies. Sprint believes that IDB's comments raise substantial issues about the consistency between the Commission's present characterization of its policy and its past articulation of those policies. Furthermore, the

Commission's statement in ¶79 that "any carrier that seeks to connect a U.S. half-circuit...to provide a switched basic service must obtain specific Section 214 authority to do so," as applied to carriers already certificated to provide switched services, raises a question of whether the Commission is once again attempting to use Section 214 improperly to regulate service offerings, a practice that was struck down nearly two decades ago in the Execunet case.[34] Accordingly, before codifying the Commission's policy, we believe the Commission should carefully rethink its policy vis-à-vis the teaching of Execunet, and because of the ambiguities involved, we believe that IDB's suggestion (n.13 at 14) that the Commission formulate proposed rules and allow opportunity for comment on those rules before any such codification takes place, is well advised.

VII. CONCLUSION

In view of all the foregoing, Sprint urges the Commission to withdraw its proposed EMA test, to address potential problems of discrimination through rules of industry-wide

[34] MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977).

applicability, and to refrain from codifying other existing policies without first proposing specific rules and allowing opportunity for comment on those rules.

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May 12, 1995

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